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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1442

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
BALTIMORE METROPOLITAN CHAPTER,
Petitioner,

v.

GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fourth Circuit

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March 17, 1980

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For the Fourth Circuit

The petitioner, Associated Builders and Contractors, Inc., Baltimore Metropolitan Chapter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 18, 1979.

OPINION BELOW

The opinion of the Court of Appeals, reported at 610 F.2d 1221, appears in the Appendix hereto at App. 1 through 13. The opinion of the United States District Court for the District of Maryland, reported at 98 L.R.R.M. 2309 (1978), appears in the Appendix hereto at App. 15 through 22. The letter of the Regional Director for the Fifth Regional Office of the National Labor Relations Board, refusing to issue complaint in this proceeding, appears in the Appendix hereto at App. 25 through 28. The letter of the General Counsel of the National Labor Relations Board affirming the Regional Director's refusal to issue complaint appears in the Appendix hereto at App. 23 through 24.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 18, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the United States district courts possess subject matter jurisdiction to review the refusal of the General Counsel of the National Labor Relations Board to issue complaint upon a charge filed before that agency.

2. Whether a governmental entity is an "employer" within the meaning of 29 U.S.C. § 158(e).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved, which are fully set forth in the Appendix hereto at App. 30 through 35 are: 5 U.S.C. §§ 701(a), 702, 706(2)(A); 28 U.S.C. § 1337; and 29 U.S.C. §§ 152(2) and (3), 153(d), 158(b)(4)(i)(ii)(B) and (e), and 160(f).

STATEMENT OF THE CASE

In May, 1976, the Mass Transit Administration ("MTA"), an instrumentality of the State of Maryland Department of Transportation, entered into an agreement with the Baltimore Building and Construction Trades Council, AFL-CIO ("Building Trades Council"), regulating certain terms and conditions of employment applicable to employees of private contractors engaged in the construction of the Baltimore Region Rapid Transit System. Pursuant to that agreement, every contractor performing work on the Rapid Transit System was required to become a party thereto.

In December, 1976, petitioner, an association of building contractors, filed a charge with the Fifth Regional Office of the National Labor Relations Board ("NLRB" or "Board") asserting that the agreement between MTA and the Building Trades Council violated the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.* (1976) ("NLRA"). More specifically, the charge alleged a violation of section 8(e) of the NLRA, 29 U.S.C. § 158(e), which proscribes agreements pursuant to which an "employer . . . agrees . . . to cease doing business with any other person. . . ."

The Regional Director referred petitioner's charge to the Division of Advice of the Office of General Counsel. By letter dated January 26, 1977, in response to petitioner's request that the charge be processed expeditiously, General Counsel stated, "The case presents novel and difficult legal issues in a complex area of the law. . . ." App. 29. On May 13, 1977, the Regional Director informed petitioner that he was refusing to issue complaint for the reason that "the MTA, as a political subdivision of a State, is not an 'employer' within the meaning" of section 8(e) of the NLRA. App. 28. The Regional Director's decision not to issue complaint was affirmed by the General Counsel of the NLRB on June 30, 1977. App. 23.

At that time, in direct contravention of General Counsel's stated reason for refusing to issue complaint, the controlling

NLRB and judicial precedent held that a governmental entity was an employer within the meaning of section 8(e). *Lufthansa German Airlines,* 197 N.L.R.B. 232 (1972), *enforced sub nom. Marriott Corp. v. NLRB,* 491 F.2d 367 (9th Cir. 1974), *cert. denied,* 419 U.S. 881 (1974); *City of Juneau,* 176 N.L.R.B. 889 (1969). The standard for determining whether to issue complaint, as enunciated by the General Counsel, is:

> If the only issues are legal . . . we dismiss the charge only when there is little likelihood, based on the Board's prior decisions, that it would find a violation. Where cases fall in the gray areas, our policy is to issue complaint so that the Board will have an opportunity to reexamine, and, if necessary, reconcile the case law in the area.

Irving, *The General Counsel: Labor Czar or Public Prosecutor?,* 1977 Labor Relations Yearbook 119, 120 (BNA).

In September of 1977, petitioner filed, in the United States District Court for the District of Maryland, a Complaint for Mandamus[1] and Declaratory Judgment against the General Counsel seeking judicial review, under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1976) ("APA"), of his refusal to issue complaint. Jurisdiction was premised on 28 U.S.C. §§ 1337. The district court granted respondent's motion to dismiss for lack of subject matter jurisdiction on March 8, 1978. In an opinion issued December 18, 1979, the United States Court of Appeals for the Fourth Circuit affirmed the district court, holding that the General Counsel's refusal to issue complaint was subject to judicial review only where the General Counsel acted in excess of his delegated powers. The court found that such was not the case in the instant matter.

On February 1, 1978, some seven months after refusing to issue complaint in the instant matter, and unbeknownst to petitioner, General Counsel issued a complaint in another matter alleging that an entity of the State of New York was an employer within the meaning of section 8(e) of the NLRA. *New*

[1] Petitioner subsequently took the position that it would not press its request for mandamus, since the General Counsel, even after a determination that a violation of the NLRA has occurred, may institute settlement discussions and procure from the parties compliance without proceeding to complaint.

York Electrical Contractors Association, Inc., 244 N.L.R.B. No. 46 (1978), decision of the administrative law judge at 1. On September 29, 1978, the administrative law judge in that case issued his decision upholding the General Counsel's position that a state entity was an employer within the meaning of section 8(e). Petitioner was not aware of the General Counsel's action in *New York Electrical Contractors Association* until shortly after publication of the Board's August 20, 1979 Decision and Order in that case—well after oral argument in the court below. In *New York Electrical Contractors Association,* the NLRB, overruling *Lufthansa German Airlines,* held that a state entity was not an employer within the meaning of section 8(e). Two of the five members of the Board, dissenting, would have adhered to the Board's decision in *Lufthansa German Airlines.* No party sought judicial review of the Decision and Order in *New York Electrical Contractors Association.*

REASONS FOR GRANTING THE WRIT

1. The jurisdiction of the federal district courts to review the refusal of the General Counsel to issue complaint, and the scope of that jurisdiction, raise important federal questions which have not been, but should be, decided by this Court.

Although this Court, on two occasions, has intimated that the General Counsel's refusal to issue complaint may be insulated from review, *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132 (1975); *Vaca v. Sipes,* 386 U.S. 171 (1967), it has yet to decide the issue. *Amalgamated Motor Coach Employees v. Lockridge,* 403 U.S. 274, 305 n.2 (1971) (dissenting opinion of Mr. Justice Douglas). Those courts of appeal which have been presented with the issue, have correctly and uniformly held that direct review by the courts of appeal, under section 10(f) of the NLRA, 29 U.S.C. § 160(f), is unavailable. *Tensing v. NLRB,* 519 F.2d 365 (6th Cir. 1974); *Hernandez v. NLRB,* 505 F.2d 119 (5th Cir. 1974); *Erie Newspaper Guild, Local 187 v. NLRB,* 489 F.2d 416 (3rd Cir. 1973); *NLRB v. IBEW, Local 357,* 445 F.2d 1015 (9th Cir. 1971); *Wellington Mill Div., West Point Mfg.*

Co. v. NLRB, 330 F.2d 579 (4th Cir.), *cert. denied,* 379 U.S. 882 (1964); *IUE v. NLRB,* 289 F.2d 757 (D.C. Cir. 1960); *General Drivers v. NLRB,* 179 F.2d 492 (10th Cir. 1950); *Lincourt v. NLRB,* 170 F.2d 306 (1st Cir. 1948). However, both the Ninth Circuit in *NLRB v. IBEW, supra* at 1016, n.2, and the D.C. Circuit in *IUE v. NLRB, supra* at 762, expressly reserved the question of district court jurisdiction to review the refusal of the General Counsel to issue complaint.

Despite the uniform holdings with respect to direct review by the courts of appeal and although no court of appeal has yet upheld district court jurisdiction, statements of the various courts of appeal evidence that confusion exists as to tne scope of jurisdiction of the district courts to review the refusal of the General Counsel to issue complaint. Two circuits have stated, without reservation, that the district courts have no jurisdiction. *Mayer v. Ordman,* 391 F.2d 889 (6th Cir.), *cert. denied,* 393 U.S. 925 (1968); *Dunn v. Retail Clerks Int'l Association,* 307 F.2d 285 (6th Cir. 1962); *NLRB v. Lewis,* 310 F.2d 364 (7th Cir. 1962). Two other circuits, in holding that the district courts do not have such jurisdiction where the exercise of jurisdiction would require the court to evaluate the General Counsel's assessment of evidentiary facts, have indicated that district court jurisdiction may not be entirely foreclosed. *Bays v. Miller,* 524 F.2d 631 (9th Cir. 1975); *Hourihan v. NLRB,* 201 F.2d 187 (D.C. Cir. 1952), *cert. denied,* 345 U.S. 930 (1953). In *Bays v. Miller,* the court noted that it was not deciding the validity of the holding in *Southern California District Council of Laborers v. Ordman,* 318 F. Supp. 633 (C.D. Cal. 1970). In the latter case, the district court asserted jurisdiction over the General Counsel's refusal to issue complaint, based on his legal interpretation as to the commencement of the limitations period set forth under section 10(b) of the NLRA, 29 U.S.C. § 160(b), and held that the General Counsel's interpretation was in error. *Bays v. Miller, supra* at 634. In *Hourihan, supra* at 188, n.4, the court stated simply:

> We need not here canvass whether, and if so under what circumstances, a court can correct an abuse of discretion by the General Counsel in failing to issue complaint.

In a subsequent case, the D.C. Circuit stated that district court jurisdiction would not lie except in the "most extreme situations." *Retail Store Employees Union Local 954 v. Rothman,* 298 F.2d 330, 332 (D.C. Cir. 1962). In *Saez v. Goslee,* 463 F.2d 214, 215 (1st Cir.), *cert. denied,* 409 U.S. 1024 (1972), the court stated that district court jurisdiction might exist if the General Counsel had "violated express statutory requirements."

In *Balanyi v. Local 1031, IBEW,* 374 F.2d 723, 726 (7th Cir. 1967), the court recognized that the district courts might have jurisdiction where the complaint alleged a violation of constitutional rights. Similarly, in *United Electrical Contractors Association v. Ordman,* 366 F.2d 776 (2d Cir. 1966), *cert. denied,* 385 U.S. 1026 (1967), *aff'g* 51 Lab. Cas. ¶ 19,761 (S.D.N.Y. 1965), the court, in a per curiam opinion, affirmed the district court's dismissal of a complaint seeking review of the General Counsel's refusal to issue complaint. The district court, however, had recognized that jurisdiction would exist if constitutional questions were presented or if the General Counsel had acted in direct violation of the statute. *United Electrical Contractors Association v. Ordman,* 51 Lab. Cas. ¶ 19,761 (S.D.N.Y. 1965).

Finally, the court below, while affirming the district court's dismissal for lack of subject matter jurisdiction, stated that jurisdiction would exist upon a showing that the General Counsel had acted "in excess of his delegated powers." *Associated Builders and Contractors, Inc., Baltimore Metropolitan Chapter v. Irving,* 610 F.2d 1221, 1227 (4th Cir. 1979). The court below, citing *Harmon v. Brucker,* 355 U.S 579 (1958), did note, however, that action taken by an administrative official based on a misinterpretation of the law constituted action "in excess of . . . statutory authority" which the courts had jurisdiction to review. *Associated Builders and Contractors, supra* at 1227, App. 11. Petitioner's complaint in the instant matter would not require the court to evaluate General Counsel's assessment of evidentiary facts, since it is limited to an allegation that General Counsel failed to act because of his misinterpretation of law. That fact, coupled with the lack of

consensus on the part of the courts of appeal concerning the availability of judical review of the General Counsel's refusal to issue complaint, suggests the need for this Court to review the issue.

Petitioner urges that, pursuant to the jurisdiction granted under 28 U.S.C. § 1337, the district courts have jurisdiction, within the parameters established by the APA to review the refusal of the General Counsel to issue complaint. The APA was enacted in 1946, one year prior to the amendments to the National Labor Relations Act which first granted to the General Counsel authority with respect to the issuance of complaints. The APA provides, *inter alia,* that "[a] person . . . aggrieved by agency action . . . is entitled to judicial review thereof," 5 U.S.C. § 702, unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The APA greatly extended the availability of judicial review beyond that which had existed prior to its enactment. *Heikkila v. Barber,* 345 U.S. 229 (1953).

In a closely analogous case involving the discretionary authority of the Secretary of Labor, under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* (1976), to commence a civil action seeking to overturn an internal union election, this Court held that pursuant to the district courts' jurisdiction under 28 U.S.C. § 1337, judicial review of the Secretary of Labor's decision not to commence such a civil action was available under the APA. *Dunlop v. Bachowski,* 421 U.S. 560 (1975). In that case, this Court stated that an administrative agency bears a heavy burden to overcome the presumption that Congress did not mean to prohibit judicial review and that such review is available except upon a clear and convincing showing of a contrary legislative intent. *Dunlop v. Bachowski, supra* at 567.

"[T]here is no provision in the [NLRA] explicitly prohibiting judicial review of the General Counsel's activities. . . ." *Saez v. Goslee, supra* at 215. Notwithstanding assertions to the contrary, the grant, in section 3(d) of the NLRA, 29 U.S.C.

§ 153(d), to the General Counsel of "final authority" with respect to the issuance of complaint does not indicate a congressional intent to preclude judicial review. The purpose of that language was to emphasize the separation of the Board's prosecutorial and adjudicative functions and to preclude review by the Board of the General Counsel's determinations on such matters. *See* H.R. Rep. No. 510, 80th Cong., 1st Sess. 5 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 541 (1948) ("1947 Legis. Hist."); 93 Cong. Rec. 6599 (1947), *reprinted in* 2 1947 Legis. Hist. at 1538 (remarks of Sen. Taft). *See also: Shaughnessy v. Pedreiro,* 349 U.S. 48 (1955).

Nor does the discretion possessed by General Counsel with respect to the issuance of complaint preclude judicial review under the APA. 5 U.S.C. § 706(2)(A) provides that the reviewing court may hold unlawful and set aside agency action found to be an abuse of discretion. Since a finding of abuse of discretion necessarily encompasses a finding that discretion was initially granted, it is clear that judicial review is not foreclosed simply because discretion exists.

The importance of the federal question involved is perhaps best demonstrated by the situation which will obtain if the writ of certiorari is denied. As previously noted, at the time of the General Counsel's refusal to issue complaint in this matter, the status of the law as established by the Board and as affirmed by the Ninth Circuit, was that a governmental entity was an employer within the meaning of section 8(e). Nevertheless, the General Counsel refused to issue complaint. Subsequently, General Counsel did issue complaint in another case, which resulted in the Board overturning its prior decision (the two dissenting members stating they would adhere to the prior decision) and holding that a governmental entity was not an employer within the meaning of section 8(e). Thus, by a 3 to 2 decision, the Board has overruled prior precedent which was affirmed by a court of appeals. Most importantly, since no party to the *New York Electrical Contractors Association* sought review and since the General Counsel, as a matter of policy, will not issue complaint when there is a dispositive ruling of the

Board to the effect that the actions complained of do not constitute an unfair labor practice, judicial review of the question of the definition of the word "employer" under section 8(e) of the NLRA will be forever precluded unless district court jurisdiction to review exists under 28 U.S.C. § 1337.

2. The scope of the definition of the word "employer" as used in 29 U.S.C. § 158(e) presents an important federal question which this Court should, but has not, decided.

Section 8(e) of the NLRA, which was added to the NLRA as the result of the 1959 amendments, provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees . . . to cease doing business with any other person . . . .

Coupled with section 8(e), Congress, in 1959, also added the language of the present section 8(b)(4)(i)(ii)(B), 29 U.S.C. § 158(b)(4)(i)(ii)(B) which provides, in pertinent part, that it shall be an unfair labor practice for a labor organization:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike . . . ; or (ii) to threaten, coerce, or restrain any person engaged in commerce, . . . where . . . an object thereof is:
>
> (B) forcing or requiring any person . . . to cease doing business with any other person . . . .

"The 1959 amendments were designed to close certain loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and court decisions." *NLRB v. Servette, Inc.*, 377 U.S. 46, 51 (1964). Prior to 1959, the so-called "secondary boycott" provisions of the NLRA were contained in section 8(b)(4)(A) of the Labor Management Relations Act, 1947, 61

Stat. 141, 142, 29 U.S.C. §158(b)(4)(A), which made it an unfair labor practice for a labor organization "to engage in, or to induce or encourage the *employees of any employer* to engage in a strike . . . where an object thereof is: (a) forcing or requiring any employer . . . or other person . . . to cease doing business with any other person." (emphasis supplied).

In *International Rice Milling Co.*, 84 N.L.R.B. 360 (1949), the Board had held that the phrase "employees of any employer" was intended to include only statutory employees as defined in section 2(3) of the NLRA, 29 U.S.C. § 152(3), and statutory employers as defined in section 2(2), 29 U.S.C. § 152(2). Under that holding, labor organizations were free to induce or encourage individuals who were not employees of a section 2(2) employer, including governmental employees, to engage in activities which otherwise would have been proscribed by section 8(b)(4)(A) of the 1947 Act. *Paper Makers Importing Co., Inc.*, 116 N.L.R.B. 267 (1956). Moreover, "[i]t had been held that § 8(b)(4)(A) did not reach threats of labor trouble made to the secondary employer himself." *NLRB v. Servette, Inc., supra* at 53.

In enacting the 1959 amendments, Congress intended to overturn those interpretations of section 8(b)(4)(A). In section 8(b)(4)(i), the phrase "any individual employed by any person" was substituted for the phrase "employees of any employer" to encompass employees and employers in a generic sense, rather than limiting it solely to statutory employees and employers. Congress also added the language of section 8(b)(4)(ii) to bring direct threats of labor trouble to a secondary employer within the activity proscribed by the NLRA.

Finally, this Court in Local 1976, *Carpenters Union v. NLRB*, 357 U.S. 93 (1958), had held that a voluntary agreement between an employer and a labor organization pursuant to which the employer agreed to cease doing business with any other person did not violate the 1947 Act. "Section 8(e) was designed to plug this gap in the legislation by making the 'hot cargo' clause itself unlawful." *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 634 (1967).

The 1959 amendments which added section 8(b)(4)(i) (ii)(B) and (e) to the Act were the result of a compromise between the House and Senate, reached in conference. The bill as passed by the Senate in 1959 would not have altered the language of section 8(b)(4)(A). S. 1555 as passed the Senate, 86th Cong., 1st Sess. (1959), *reprinted in* I NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 516-585 (1959) ("1959 Legis. Hist."). The House bill, however, in addition to including the language presently contained in section 8(b)(4)(i)(ii)(B), making it an unfair labor practice to engage in the proscribed activity for the purpose of "forcing or requiring any person . . . to cease doing business with any other person . . ." would have made it an unfair labor practice to engage in such activity for the purpose of "forcing or requiring any person to cease, *or agree to cease,* doing business with any other person." H.R. 8400, 86th Cong., 1st Sess. § 705(a) (1959), *reprinted in* I 1959 Legis. Hist., at 681. (emphasis supplied). Section 8(e) as contained in H.R. 8400, embodied, in all pertinent aspects, the present language of section 8(e).

In conference, the pertinent language of section 8(b)(4)(i)(ii)(B) and (e), as contained in H.R. 8400, was agreed to except that the phrase "or agree to cease" was deleted from subparagraph B of section 8(b)(4). The conference report to the House explains the agreement to delete that phrase as follows:

> [T]he phrase "or agree to cease" was deleted from section 8(b)(4)(B) because the committee of conference concluded that the restrictions imposed by such language were included in other provisions dealing with prohibitions against entering into "hot cargo" agreements, and therefore their retention in section 8(b)(4)(B) would constitute a duplication of language. . . .

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959), *reprinted in* I 1959 Legis. Hist., at 942.

Since Section 8(b)(4)(i)(ii)(B) as embodied in H.R. 8400 would have precluded "hot cargo" agreements entered into by any person, including both section 2(2) and non-section 2(2) employers, the word "employer" in section 8(e) must be similarly interpreted; else, there is no "duplication of language."

The necessity for this Court to review the issue presented is demonstrated by the situation that will obtain if the definition of a section 8(e) employer, as adopted by the Board in *New York Electrical Contractors Association,* prevails. As the Board recognized in that case, activity proscribed by section 8(b)(4)(i)(ii) which forces a governmental entity to cease doing business with any person is violative of the NLRA. Yet, if a governmental entity and a labor organization voluntarily enter into an agreement which requires the governmental entity to cease doing business with any person, there is no violation. *New York Electrical Contractors Association,* therefore, reopens the precise loophole which Congress intended to close by the 1959 amendments. Finally, despite the intent of the NLRA to establish a uniform federal labor relations policy and to preempt the states from regulating labor relations activity arguably subject to the provisions of the NLRA, the Board's decision in *New York Electrical Contractors Association* permits the states, through the vehicle of a voluntary agreement with a labor organization, and as a condition of doing business with the state, to regulate every detail of a private employer's labor relations policy, including the designation of the labor organization(s) the employer will be required to recognize.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

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ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
BALTIMORE METROPOLITAN CHAPTER,
Appellant,

v.

JOHN R. IRVING, General Counsel
National Labor Relations Board,
Appellee.

No. 78-1268.

**United States Court of Appeals,
Fourth Circuit.**

Argued Jan. 11, 1978.

Decided Dec. 18, 1979.

Before HAYNSWORTH, Chief Judge, WIDENER and HALL, Circuit Judges.

WIDENER, Circuit Judge:

This is an appeal from an order of the District Court for the District of Maryland dismissing an action by Associated Builders and Contractors (ABC) for a declaratory judgment and a writ of mandamus against the General Counsel of the National Labor Relations Board to declare unlawful the refusal of the General Counsel to file a requested complaint with the National Labor Relations Board and to require him to file such a complaint. We affirm the dismissal by the district court.

The Mass Transit Administration, an instrumentality of the Department of Transportation of the State of Maryland, entered into a "Labor Stabilization Agreement" with the Baltimore Building and Construction Trade Council, AFL-CIO and 21 other labor organizations. Article III of that agreement,

which establishes conditions of employment in connection with the construction of the Baltimore Region Rapid Transit System, provides:

> Nothing in this agreement shall limit the selection or utilization of contractors or subcontractors to perform construction work on the Rapid Transit Project; provided, however, that all such contractors shall comply with the terms of this agreement.

Article IV(a) of the agreement provides in part:

> . . . By accepting any award of construction work, either as contractor or subcontractor (of any level or tier), on any part of the jobsite of the MTA project each employer agrees (i) to be bound by each and every provision of this Agreement, (ii) to execute either personally or through a duly authorized agent (in the form set forth in either Exhibit A or Exhibit B hereto) its agreement to that effect, and (iii) to require that any Employer which is a subcontractor to it agree in writing (in form set forth in either Exhibit A or Exhibit B hereto) to be bound by the terms of the agreement.

The gist of the agreement, of course, is that all contractors and subcontractors on the project would have to sign the union contract.

ABC's complaint alleges that the contract is an unlawful hot-cargo agreement and thus an unfair labor practice under § 8(e) of the National Labor Relations Act (NLRA) (29 U.S.C. § 158(e)).

Section 8(e) of the NLRA provides in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from hauling, using, selling, transporting, or otherwise dealing in any of the

> products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcable and void: . .

Section 8(e) was added as an amendment to the NLRA in 1959 in an attempt to close a "loophole" in the then existing law against secondary boycotts.[1] Although secondary boycotts were banned by the statute in 1947,[2] unions in many instances could obtain the same result through hot cargo or hot goods clauses in collective bargaining agreements. These clauses were designed to prevent an employer from dealing in goods of an employer engaged in a labor dispute.

A review of the legislative history shows a grave concern in Congress over the widespread use of this tactic by the Teamsters union.[3] Apparently that union was well known for entering into such agreements with trucking companies, thus preventing another company which was having a labor dispute from shipping its own goods or receiving supplies, etc.

To close the loophole in § 8(b)(4), Congress enacted § 8(e), making such contracts between employers and unions illegal, unenforceable and a violation of the statute and an unfair labor practice.

ABC is an association of contractors, subcontractors and suppliers doing business in the Baltimore area. It filed a charge with the Fifth Regional Office of the NLRB, charging that the Transit Administration contracts violated the hot cargo provision of § 8(e) of the statute. The Regional Director refused to file a complaint with the Board upon the ground that the Transit Administration, being a state agency, was "not an employer

[1] 1959 *U.S. Code Cong. & Admin. News* pp. 2318, 2443. See also 2383-84.

[2] § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4).

[3] 1959 *U.S.Code Cong. & Admin.News* pp. 2443-45, 2383-84.

within the meaning of section 2(2) of the National Labor Relations Act" and "[t]herefore the proscriptions of § 8(e) do not apply to such governmental employers." ABC appealed that decision to the office of the General Counsel, which sustained the Regional Director's ruling.

ABC then filed this action in the district court seeking a declaratory judgment that the General Counsel's finding was in error. It contends that state agencies are indeed employers within the meaning of the statute. It also sought a writ of mandamus to require the General Counsel to issue a complaint upon the charge filed. Jurisdiction is claimed under 28 U.S.C. §§ 1337 and 1346(a)(2).[4]

The General Counsel moved to dismiss on the ground that the district court lacked subject matter jurisdiction. The district court granted the motion and dismissed the complaint ruling that the decision of the General Counsel not to file a complaint is not reviewable by a district court. The district court determined that the court was without jurisdiction to consider the matter.

Whether the decision of the General Counsel in this case is final and therefore not reviewable in any court depends upon the construction of § 3(d), 29 U.S.C. § 153(d), of the statute which provides, in part, as follows:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall

[4] On appeal ABC does not rely upon § 1346(a)(2) as a basis for jurisdiction.

have such other duties as the Board may prescribe or may be provided by law. . .

The NLRA contains no express provision authorizing judicial review of decisions by the General Counsel refusing to file a complaint with the Labor Board charging an unfair labor practice.

ABC contends that under the Administrative Procedure Act, enacted one year prior to the 1947 amendments to the NLRA, it has a right to obtain judicial review of the General Counsel's decision. 5 U.S.C. § 702 provides in part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.
>
> * * * * *

The passage just quoted from, 5 U.S.C. § 702, would appear to entitle ABC to judicial review[5] were it not for the provisions of 5 U.S.C. § 701(a) as follows:

> This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

The issue, then, is whether, under 5 U.S.C. § 701(a) judicial review of the General Counsel's decision, which would otherwise be available under 5 U.S.C. § 702, is precluded by § 3(d) of the NLRA.

[5] The Administrative Procedure Act, in and of itself, however, does not confer subject-matter jurisdiction upon the court. *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

We think the legislative history shows that the General Counsel was intended to be a political position similar to that of an attorney general or other executive officer of the government. The office of General Counsel, although representing the Board in its actions, was created to be independent of the Board and responsible only to the President and the Congress rather than to the Board.[6] Appointment of the General Counsel was placed not in the hands of the Board but in the hands of the President. Our position is sustained by the House Conference Report and the position of Senator Taft which follows:

> (3) Section 10(b) of the amended act under the House Bill contemplated that, in unfair practice cases, the administrator would investigate charges, issue complaints, and prosecute cases. The Senate amendment did not contain comparable provisions. As previously noted, the conference agreement contemplates that these functions will be performed under the exclusive and independent direction of the General Counsel of the Board, an official appointed by the President by and with the advice and consent of the Senate.

House Conference Report No. 510 on H.R. 3020, *1 Leg. Hist. of the L.M.R.A.* 557 (1947), U.S.Code Cong.Serv. 1947, pp. 1135, 1159.

As noted by Senator Taft, co-sponsor of the bill:

> What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group to a statutory officer responsible to the President and to the Congress. So far as having unfettered discretion is concerned he, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or a state attorney general. Congressional Record, Senate, June 12, 1947, p. 7000.[7]

[6] See *Leg. Hist. of the L.M.R.A.* at 296, 365, 541, 866, 900-01, 905, 918, 1494, 1538, 1559-60, 1567, 1576-77, 1588, 1617 and 1629-32.

[7] See also the comments of Congressman Hartley, 1 *Leg. Hist. of the L.M.R.A. 883.*

We think it was the intent of Congress that the General Counsel's discretion as to the issuance of complaints should ordinarily be checked by his political responsibility, not by judicial review. We therefore adopt the view alluded to by this court earlier and by many other courts that his "final authority" in most instances precludes judicial review of his decision regarding the issuance of an unfair labor practice complaint.[8]

Although the issue as to the interpretation of § 3(d) has not been resolved definitively by the Supreme Court, that court or its justices have, in various decisions, indicated in discussion that such a decision by the General Counsel is not reviewable by the courts.

Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), involved a suit by the administrator of a deceased employee against his union for the breach of the union's duty of fair representation. The Court held that the employee's right of action was not preempted by the jurisdiction granted the Labor Board by the LMRA, and on page 182, 87 S.Ct. on pages 912-13 stated:

> . . . [T]he duty of fair representation has stood as a bulwark to prevent arbitratory union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's *Miranda's Fuel* decision from

[8] *Wellington Mill Div., West Point Mfg. Co. v. NLRB,* 330 F.2d 579 (4th Cir. 1964), cert. den., 379 U.S. 882, 85 S.Ct. 144, 13 L.Ed.2d 88 (1964); *Bays v. Miller,* 524 F.2d 631 (9th Cir. 1975); *Hernandez v. NLRB,* 505 F.2d 119 (5th Cir. 1974); *Newspaper Guild, Erie Newspaper Guild v. NLRB,* 489 F.2d 416 (3d Cir. 1973); *Mayer v. Ordman,* 391 F.2d 889 (6th Cir. 1968), cert. den., 393 U.S. 925, 89 S.Ct. 257, 21 L.Ed.2d 261 (1968); *Div. 1267 Amal. Ass'n of Street, El. Ry., Etc., Emp. v. Ordman,* 116 U.S. App.D.C. 7, 320 F.2d 729 (D.C. Cir. 1963). Cf. *Illinois St. Empl. Coun. 34 AF of S., C & M. E. v. NLRB,* 395 F.Supp. 1011 (N.D. Ill. 1975), aff'd without opinion 530 F.2d 979 (7th Cir. 1976). But see *Southern Cal. Dist. Coun. of Lab., Local 1184 v. Ordman,* 318 F.Supp. 633 (C.D. Cal. 1970).

The *Wellington* case may well be read as dispositive here.

> this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the *Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.* [Citation omitted, Emphasis added]

Although *Vaca* resulted in the plaintiff being allowed to proceed, the opposite result occurred in *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1970). In that case, resolution of the issue as to whether an employee could be expelled by his union for non-payment of dues depended upon the proper construction of the union constitution and bylaws. The Court held that a state court could not make such a determination because it was preempted by the power of the Board to pass upon unfair labor practices. Unfortunately for the plaintiff, in a companion case, the General Counsel had refused to issue a complaint. In arguing against preemption, because an admittedly wronged plaintiff might be left without a remedy, Mr. Justice Douglas, in his dissenting opinion, stated:

> . . . If the General Counsel holds against the complaining party and refuses to issue an unfair labor practice complaint, the decision is apparently unreviewable . . . .

Id. at 303-304, 91 S.Ct. at 1926.

In *National Labor Relations Board v. Sears, Roebuck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), the Court in dealing with a request under the Freedom of Information Act for certain papers, generated by the General Counsel in determining whether to permit the filing of certain labor practice complaints, stated that certain opinions by the Office of the General Counsel supporting a decision not to proceed with a case were parts of a final opinion and therefore subject to disclosure. The Court noted that:

> . . . Congress has delegated to the Office of General Counsel "on behalf of the Board" the unreviewable authority to determine whether a complaint is filed. . . .

> In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

Id. at 138-39, 95 S.Ct. at 1511.

See also *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 191-92, 86 S.Ct. 327, 15 L.Ed.2d 254 (1965).

In *Wellington Mill Division,* 330 F.2d 579 (4th Cir. 1964), this court reviewed a decision by the Board holding that certain discharges were unfair labor practices. There the union also asked the court to rule on the merits of a claim not charged in the complaint filed by the General Counsel or considered by the Board. In refusing to consider the union's claim, this court stated:

> Section 3(d) of the Act [commits] to the discretion of the General Counsel the decision as to whether he will issue a complaint and his refusal to do so is final and unappealable. The decision as to the *scope* of a complaint is for the General Counsel.

Id. at 590. The court then concluded that it had "no power to order the General Counsel to issue a complaint," p. 591, and did not consider the merits of the question.

We therefore conclude that the General Counsel's refusal to issue a complaint is ordinarily not reviewable by federal courts. An issue remains, however, as to whether the nonreviewability of that action, committed to the discretion of the General Counsel, is based upon a failure to state a claim upon which relief can be granted or upon lack of jurisdiction by the federal

courts. We believe the latter, with an exception to be noted later.

While the question has not been decided by the Supreme Court, many circuits have based their conclusion of nonreviewability on lack of jurisdiction.

In *Mayer v. Ordman,* 391 F.2d 889 (6th Cir. 1968), cert. den., 393 U.S. 925, 89 S.Ct. 257, 21 L.Ed.2d 261 (1968), the Sixth Circuit held that federal courts were without jurisdiction to consider claims arising from the General Counsel's refusal to issue a complaint upon request. Relying upon *Vaca,* the court noted that it was well settled that the "National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigated unfair labor practice charges and determines whether to issue a complaint thereon." Id. at 889.

Most of the circuits have followed this line of thought and have either reasoned or held that the federal courts were without jurisdiction to consider such a decision by the General Counsel.[9]

In *Panama Canal Co. v. Grace Lines, Inc.,* 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1957), the Supreme Court indicated that "[s]ection 10 of the Administrative Procedure Act . . . *excludes from the categories of cases subject to judicial review* 'agency action' that is 'by law committed to agency discretion.' "

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[9] *Bays v. Miller,* supra; *Saez v. Goslee,* 463 F.2d 214 (1st Cir. 1972), cert. den., 409 U.S. 1024, 92 S.Ct. 466, 34 L.Ed.2d 316 (1972); *Balanyi v. Local 1031, IBEW,* 374 F.2d 723 (7th Cir. 1967); *United Electrical Contractors Assoc. v. Ordman,* 366 F.2d 776 (2d Cir. 1966), cert. den., 385 U.S. 1026, 87 S.Ct. 753, 17 L.Ed.2d 674 (1966); *Contractors Assoc. of Phil. & Eastern Pa. v. NLRB,* 295 F.2d 526 (3d Cir. 1961), cert. den., 369 U.S. 813, 82 S.Ct. 689, 7 L.Ed.2d 612 (1962); *Hourihan v. NLRB,* 91 U.S.App.D.C. 316, 201 F.2d 187 (D.C.Cir.1952), cert. den., 345 U.S. 930, 73 S.Ct. 792, 97 L.Ed. 1359 (1953); *General Drivers, Etc. Local 886, AFL v. NLRB,* 179 F.2d 492 (10th Cir. 1950). Cf. *Illinois St. Empl. Coun. 34 AF of S., C & M. E. v. NLRB,* 395 F.Supp. 1011 (N.D.Ill., 1975), aff'd without opinion, 530 F.2d 979 (7th Cir. 1976); *Div. 1267 Amal. Ass'n of Street, El. Ry., Etc., Emp. v. Ordman,* 320 F.2d 729 (D.C. Cir. 1963).

Other cases have merely said without explanation of underlying reasoning that such a decision of the General Counsel is not reviewable. E.g., *NLRB v. Internat'l Bro. of Elec. Wkrs, Loc. 357,* 445 F.2d 1015 (9th Cir. 1971).

(Emphasis ours) Id. at 317, 78 S.Ct. at 757. We think by this language the Court is indicating that the federal courts are without jurisdiction to consider such matters.

In that case plaintiff sued in a federal court seeking to require the Panama Canal Co. to raise the tolls that it charged for use of the canal. The Court, in reversing the decision of the court of appeals that had entered summary judgment for the plaintiffs, concluded that such a decision to act or not to act was left to the "expertise of the agency burdened with the responsibility for decision." Id. at 318.

But, in *Panama Canal Co.*, the Court indicated that judicial relief is sometimes available where the agency's failure to act turns on a mistake of law. Id. at 318, 78 S.Ct. 752. That position was taken by the Court in *Harmon v. Brucker,* 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958). There the Court concluded that jurisdiction did lie with the federal courts to decide whether the Secretary of the Army had misapplied the law in considering a veteran's discharge status. First the Court noted that "[g]enerally, judicial relief is available to one who has been injured by an act of a government officer which is in excess of his express or implied powers." Id. at 582, 78 S.Ct. at 435. The Court implicitly concluded that the action taken by the Secretary of the Army, after misinterpreting the law by way of regulations previously issued, was in excess of his statutory authority. In essence, the Court decided that this mistake of law by an agency showed that it acted in excess of its statutory authority and thus was such an action as is reviewable by the courts.

Again, in *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), the Court held that an act of the NLRB refusing to take a separate vote of professional employees as to whether or not they would be included in a bargaining unit was in violation of the positive command of a statute that "the Board shall not" decide a mixed unit (professional and non-professional) is appropriate "unless a majority of such professional employees vote for inclusion." The Court held such action to be in excess of the Board's delegated powers and thus

subject to judicial review by way of direct suit in the district court.

We think the *Leedom* standard is the proper standard to use here, for we see no significant difference in the standard that ought to be applied in reviewing acts of the Board and acts of the General Counsel when judicial review is sought by means other than those provided for by special statute. Applying that standard, we are of opinion we should not review an act of the General Counsel in refusing to issue an unfair labor practice complaint unless his act is in excess of his delegated powers. While it is readily seen that an act of the General Counsel may be so far outside the prescriptions of law as to amount to action taken in excess of delegated power, such as when clearly contrary to a specific prohibition of a statute as in *Leedom*, we think the question of whether or not the Transit Administration is an employer within the meaning of the statute involved here is not so clear that we can say the act of the General Counsel in this case (in giving his opinion that the Transit Administration was not an employer within the meaning of the statute) was in excess of his delegated authority. It must be admitted that the General Counsel, comparing him to an attorney general as the legislative history indicates we should, must give his opinion on the meaning of many statutes in his ordinary day to day duties and that it is certainly within his authority so to do. And, while it may be true that the reasoning of the Board in *Lufthansa German Airlines*, 137 NLRB 232 (1972), as adopted by the Ninth Circuit in *Marriott Corp. v. NLRB,* 491 F.2d 367 (9th Cir. 1974), seems preferable to the reasoning of the Board in *New York Electrical Contractors Association,* 244 NLRB, No. 46 (1979), which latter case overruled *Lufthansa*, nevertheless, the conflicting opinions of the Board on precisely the same subject within a few years of each other, illustrates our opinion that the meaning of the statute is not so clear that we can say with reasonable certainty that the General Counsel exceeded his delegated authority in his construction of it, although he well may have been wrong.

In such cases the courts, of course, do have jurisdiction to determine their own jurisdiction, but unless the court can ascer-

tain that the General Counsel acted in excess of his delegated authority, it has no jurisdiction to require him to act, and should dismiss the case for want of jurisdiction. This the district court properly did.

The judgment of the district court is accordingly AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

December 18, 1979

To: N. Peter Lareau, Esq. Aileen Armstrong, Esq.

Russell T. Baker, Esq. Linda Dreeben, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 78-1268 this date.

The Court's opinion is enclosed.

* * *

WILLIAM K. SLATE, II,
Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Associated Builders and Contractors, Inc.,
Baltimore Metropolitan Chapter *

vs. * Civil No. Y-77-1529

John S. Irving *

MEMORANDUM AND ORDER

The Associated Builders and Contractors, Inc., have initiated this action to compel the General Counsel of the NLRB to file a complaint with the Labor Board against the Mass Transit Association (MTA) and the Baltimore Building and Construction Trades Council, AFL-CIO. The underlying basis for the dispute is a contract between the MTA and the Trades Council containing an agreement that the MTA would not hire any subcontractors for the construction of the Baltimore subway who would not also sign the contract. The plaintiff has charged that this is an unfair labor practice violative of section 8(e) of the

NLRA (29 U.S.C. § 158(e)). The General Council has refused to file a complaint with the Board. Consequently, the plaintiff, alleging jurisdiction under 28 U.S.C. §§ 1337, 1346(a), has asked this Court to order the General Counsel to do so. The defendant, General Counsel, has, in response, moved to have the complaint dismissed for want of subject matter jurisdiction.

The National Labor Relations Board, absent circumstances not present here, has exclusive jurisdiction to adjudicate charges of unfair labor practices. *Garner v. Teamsters Union,* 346 U.S. 485 (1953). Federal courts participate after Board adjudication when a federal court of appeals may entertain an enforcement action by the Board, or a petition for review by the initial complainants. 29 U.S.C. §§ 160(e), (f).

The complaint of a private party initiates NLRB unfair labor practice proceedings. Before 1947, the Board itself, acting as prosecutor and judge, processed the complaint. In an effort to separate these functions, the Congress in 1947 created the Office of General Counsel within the NLRB, empowering it to investigate unfair labor practice charges and, when warranted, to issue complaints. 29 U.S.C. § 153(d). The General Counsel has delegated an initial review function to 31 Regional Directors. 29 C.F.R. §§ 101.8, 102.10. When a charge is filed, a member of the Regional Director's staff conducts an investigation. 29 C.F.R. § 101.4. If, on the basis of the investigation, the Regional Director is satisfied that the charge has merit, a settlement will be attempted, or a complaint filed. If the Regional Director determines that the charge has no merit, he informs the charging party of his decision and the reasons for it. 29 C.F.R. §§ 101.6, 101.8, 102.15. The charging party has a right to appeal an adverse decision to the General Counsel, 29 C.F.R. §§ 101.6, 102.19, where the charge is reviewed by a division of the General Counsel's office which prepares a legal memorandum for the appeals committee, resulting in a tentative assessment of the charge. The charging party has the right to make written, or in some cases, an oral presentation to the committee. 29 C.F.R. § 102.19(b). The General Counsel then makes a final determination whether or not to take the complaint before the Board. In the present case, the General Counsel dismissed the

complaint presented by the Associated Builders and Contractors, Inc. The issue here is whether a court, specifically a federal district court, can review this determination. It cannot.

Section 3(d), 29 U.S.C. § 153(d), provides that the General Counsel:

> shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaint before the Board . . . 29 U.S.C. § 153(d).

Courts have generally interpreted the phrase "final authority" to preclude judicial review of a refusal by the General Counsel to file a complaint. In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-139 (1975), the Supreme Court stated, albeit in dicta, that:

> Congress has delegated to the Office of the General Counsel "on behalf of the Board" the unreviewable authority to determine whether a complaint shall be filed . . . The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of the General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

See also Vaca v. Sipes, 386 U.S. 171, 182 (1967); *Amalgamated Motor Coach Employees v. Lockridge,* 403 U.S. 274, 303-304 (1971) (Douglas, J. dissenting).

The Supreme Court dicta reflect the holdings of a substantial majority of lower courts to the effect that the General Counsel's office is insulated from review, either by a court of appeals under § 10 (29 U.S.C. § 160); *see, e.g., Echols v. NLRB,* 525 F.2d 288 (6th Cir. 1975); *Hernandez v. NLRB,* 505 F.2d 119 (5th Cir. 1974) (*per curiam*); *Erie Newspaper Guild v. NLRB,* 489 F.2d 416 (3rd. Cir. 1973); *General Drivers v. NLRB,* 179 F.2d 492 (10th. Cir. 1950); *Lincourt v. NLRB,* 170 F.2d 306

(1st. Cir. 1948); or by a district court under 28 U.S.C. § 1337; *see, e.g., Bays v. Miller,* 524 F.2d 631 (9th. Cir. 1975); *Mayer v. Ordman,* 391 F.2d 889 (6th. Cir.) (*per curiam*), *cert. denied,* 395 U.S. 925 (1968); *Division 1267 v. Ordman,* 320 F.2d 729 (D.C.C. 1963); *United Electrical Contr. Ass'n. v. Ordman,* 258 F. Supp. 758 (S.D. N.Y. 1965), *aff'd,* 366 F.2d 776 (2nd. Cir. 1966) (*per curiam*).

The Fourth Circuit Court of Appeals has concurred in the determination that the decisions of the General Counsel are unreviewable. *Wellington Mill Div. v. NLRB,* 330 F.2d 579 (4th Cir. 1964), *Holland v. Unico,* 81 L.R.R.M., 2736 (4th Cir. 1972). Pursuant to these directives this Court has also refused jurisdiction. *Grolnick v. Furniture Workers,* 91 L.R.R.M., 2558 (D. Md. 1976).

The intent of Congress is plainly in accord with these decisions. The words of the statute itself, vesting "final authority" in the General Counsel, suggest that his determinations are unreviewable.

The focus of Congress in enacting § 3(d) of the Taft-Hartley Act was on the transfer of the prosecutorial function from the Board to the General Counsel. *See;* Note, "A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint under the NLRA", 86 Yale L.J., 1349 (1977). It is therefore significant that prior to the 1947 legislation, the Board's discretion to issue complaints, was thought unreviewable. *NLRB v. Indiana & Michigan Electric Co.,* 318 U.S. 9, 18-19 (1943), *Jacobsen v. NLRB,* 120 F.2d 96, 100 (3rd. Cir. 1941). Although the relevant cases suggested this in dicta, the language is clear. There is no reason to think that Congress's understanding was undermined by this technical distinction. In the absence of an explicit directive, it cannot be assumed that Congress intended to alter as well as transfer the power to investigate and issue a complaint.

Also indicative of the Congressional position on judicial review is the following statement of Senator Taft.

> What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group (the Board's legal assistants) to a statutory officer responsible to the president and to the Congress. So far as having unfettered discretion is concerned, he, of course, must respect the rules of decision of the Board and the courts. In this respect, his function is like that of the Attorney General.

Statement of Senator Taft, 93 Cong. Record, 6859 (1947). The implication is that, like the Attorney General, the General Counsel has unfettered discretion in issuing complaints.

Congress' acquiesence to the judicial findings of non-reviewable discretion provides another inference of its intent. That Congress has appreciated the interpretation of § 3(d) as precluding judicial review is apparent from numerous hearings and unsuccessful proposals to curtail the discretion of the General Counsel. *See,* Note, 86 Yale L.J. at nn.25 & 45.

Nor does the Administrative Procedure Act, enacted one year prior to the Taft-Hartley Act, dictate a different conclusion about the congressional intent for § 3(d). Although it greatly expanded judicial review of agency action, the APA does not provide for review if the applicable enabling statute precludes it. 5 U.S.C. § 701(a). It was clearly thought that the discretion of the NLRB to issue complaints fits within this exception to the APA's general rule of judicial review.

> This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review . . . . Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts. *Jacobsen v. N.L.R.B.,* 120 F.2d 96 (C.A. 2).

Addendum to Sen. Rept. 752, 79th Cong., 1st Sess. (1946).

The plaintiff has cited several cases which hinted that under certain circumstances judicial review by a district court might be appropriate. For example, in *Hourihan v. NLRB,* 201 F.2d 187, 188, n.4 (D.C.C. 1952), *cert. denied,* 345 U.S. 930 (1953), the court stated:

> Upon the case thus made out in the petition, depending as it did upon an evaluation of evidence, the issuance of a complaint lay within the discretion conferred upon the General Counsel by the statute . . . . We need not here canvass whether, and if so under what circumstances, a court can correct an abuse of discretion by the General Counsel in failing to issue a complaint.

Similar language appears in *Saez v. Goslee,* 463 F.2d 214, 215 (1st. Cir. 1972); *NLRB v. IBEW,* 445 F.2d 1015, n.2 (9th Cir. 1971); *Retail Store Employees v. Rothman,* 298 F.2d 330, n.1 (D.C.C. 1962).

Two courts have taken jurisdiction to review the General Counsel's dismissal of a charge. One, *Illinois St. Employees Council 34 v. NLRB,* 395 F. Supp. 1011 (N.D. Ill, 1975), *aff'd,* 530 F.2d 979 (7th Cir. 1976), examined the Counsel's determination and affirmed it. The other, *Southern California Dist. Council v. Ordman,* 318 F. Supp. 633 (C.D. Cal. 1970), asserted jurisdiction and reversed the General Counsel.

What would constitute the appropriate circumstances is somewhat unclear. In an analogous situation judicial review of Board adjudication of representation questions is permissible for constitutional questions, *Fay v. Douds,* 172 F.2d 720 (2nd. Cir. 1949), or for Board action in direct violation of the NLRA, *Leedom v. Kyne,* 358 U.S. 184 (1958). In line with this the Seventh Circuit suggested a review of the General Counsel when constitutional rights are at stake, *Balanyi v. Local 1031 IBEW, supra,* and the Ninth suggested review of cases where the General Counsel's decision is "wholly without basis in law" *NLRB v. IBEW, supra* at n.2.

There can be little question that when a constitutional right is implicated, a federal court has jurisdiction to resolve the claim. Here, no substantial constitutional claim is presented. The plaintiff does not protest the means by which the General Counsel came to a determination, but disagrees with the substance of that determination. Thus, procedural due process rights are not at issue. *See also Saez v. Goslee, supra* at 215. Moreover, the Court is satisfied that the General Counsel's refusal to file a complaint is not so arbitrary and capricious that the doctrine of substantive due process ought to be exhumed.

The jurisdiction of the court does not extend beyond these considerations. The authority in support of a more extensive judicial oversight is weakened by subsequent cases in two of the circuits which seemed to espouse it; *Div. 1267 v. Ordman, supra,* (D.C.C.) and *Bays v. Miller, supra,* (9th Cir.); neither of which mentioned even the possibility of judicial review. The Second Circuit called the possibility of district court jurisdiction "dubious". *NLRB v. Local 182, Teamsters,* 314 F.2d 53 (2d. Cir. 1963).

To assert even limited jurisdiction over statutory interpretation by the General Counsel would require a review of the complaint of each disappointed unfair labor practice petitioner who came into court. The burden on district courts, generally unfamiliar with unfair labor practice cases, would be immense. In fiscal year 1976, the General Counsel and his regional directors processed 34,509 unfair labor practice charges of which 35.9% were dismissed. 41 NLRB Ann. Rept. 4, 5 (1976). The number of charges has increased each year since 1972. There is no reason to believe that the number of potentially reviewable decisions will decrease in the future. If anything, the increased opportunity for success which would accompany judicial review would accelerate the increase.

The benefits derived from such review would be uncertain. The insulation of the General Counsel satisfies a need to quickly resolve complaints which, if the subject of prolonged proceedings, would perpetuate labor tensions. H. Saferstein,

"Nonreviewability: A Functional Analysis of Committed Agency Discretion", 82 Harv. L. Rev., 367, 382 (1968).

Judicial review is not mandatory for every individual who feels aggrieved. Constitutional and perhaps common law claims are a different matter; some court, somewhere, must hear them. If Congress wishes, it is acceptable to have statutory rights adjudicated without judicial oversight. The Court is satisfied that this is what Congress intended in enacting § 3(d).

Accordingly, it is this 8th day of March, 1978, by the United States District Court for the District of Maryland,

ORDERED:

That the complaint be, and the same is, hereby DISMISSED.

/s/ Joseph H. Young
United States District Judge

June 30, 1977

Re: Baltimore Building and
Construction Trades
Council AFL-CIO
(Mass Transit
Administration)
Case No. 5-CE-57

A. Samuel Cook, Esq.
N. Peter Lareau, Esq.
Venable, Baetjer & Howard
1800 Mercantile Bank &
Trust Building
Two Hopkins Plaza
Baltimore, Maryland 21201

Gentlemen:

Your appeal from the Regional Director's refusal to issue a complaint in the above-captioned case has been duly considered by this office.

The appeal is denied for the reasons set forth in the Summary Report attached to the Regional Director's letter of May 13, 1977.

Very truly yours,

John S. Irving
General Counsel

By _____
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 5

Baltimore Building &
Construction Trades
Council, AFL-CIO
5907 Harford Road
Baltimore, Maryland 21214

Mass Transit Administration,
an Instrumentality of the
Department of Transportation of the
State of Maryland
Baltimore Subway Project
1515 Washington Boulevard
Baltimore, Maryland 21230

Associated Builders &
Contractors, Inc.
Baltimore Metropolitan Chapter
Heaver Plaza, Suite 702
1301 York Road
Lutherville, Maryland 21903

Maryland State Department
of Transportation
Legal Department
2200 Somerville Road
Annapolis, Maryland 21401

Melnicove, Greenberg,
Kaufman & Weiner
Ten Light Street
Baltimore, Maryland 21202
Attn: Joseph S. Kaufman, Esq.

Mass Transit Administration
109 East Redwood Street
Baltimore, Maryland 21202
Attn: Mr. L. A. Kimball
Deputy Administrator

May 13, 1977

Venable, Baetjer and Howard
Attn: Mr. A. Samuel Cook
Mr. N. Peter Lareau
Attorneys at Law
Two Hopkins Plaza
Baltimore, MD 21201

Re: Baltimore Building and Construction
Trades Council, AFL-CIO
(Mass Transit Administration)
Case 5-CE-57

Gentlemen:

The above-captioned case(xx), charging violations under Section 8 of the National Labor Relations Act, as amended, has (xxxx) been carefully considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter. A written summary report of the basis for my conclusions has been requested and, accordingly, I am attaching one hereto.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C., 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on May 26, 1977. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with me within the time stated above.

Very truly yours,

William C. Humphrey
Regional Director

Attachment and Enclosures

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Cc: General Counsel
National Labor Relations Board
Washington, D.C. 20570

Associated Builders and Contractors, Inc.,
Baltimore Metropolitan Chapter
Heaver Plaza, Suite 702
1301 York Road
Lutherville, Maryland 21093

Baltimore Building and Construction
Trades Council, AFL-CIO
Attn: Mr. Edward Courtney
President
5907 Harford Road
Baltimore, MD 21214

Cc:

Mass Transit Administration, an
Instrumentality of the Department
of Transportation of the State of
Maryland
Attn: Mr. Walter J. Addison
Baltimore Subway Project
1515 Washington Boulevard
Baltimore, MD 21230

Maryland State Department of
Transportation
Legal Department
2200 Somerville Road
Annapolis, Maryland 21401

Melnicove, Greenberg, Kaufman &
Weiner
Attn: Mr. Joseph S. Kaufman
Attorney at Law
10 Light Street
Baltimore, MD 21202

Mass Transit Administration
Attn: Mr. L. A. Kimball
Deputy Administrator
109 East Redwood Street
Baltimore, MD 21202

SUMMARY REPORT

As a result of the investigation, it appears that the burden of establishing that the Baltimore Building and Construction Trades Council, AFL-CIO, violated Section 8(e) of the Act by entering into and maintaininq an agreement with the Mass Transit Administration, an Instrumentality of the Department of Transportation of the State of Maryland, (herein called MTA) cannot be sustained. It was concluded that further proceedings are not warranted because MTA, a state governmental entity, is not subject to the proscriptions of Section 8(e). The MTA, as a political subdivision of a state, is not an "employer" within the meaning of Section 2(2), although it is a "person" within the meaning of Section 2(1) of the Act. Therefore, the proscriptions of Section 8(e) do not apply to such a governmental person. The cases which hold that political subdivisions are entitled to the protection of 8(b)(4)(B) are not dispositive of this issue since the proscription and order in such cases operate against the union and not the political subdivision. See, e.g., City of Juneau, 176 NLRB 889; Local 3, IBEW (Mansfield Contracting Corp.), 205 NLRB 559, 563, and cases cited therein. Further, the cases which hold that Section 8(e) applies to agreements between a union and a person such as an airline are not dispositive of the issue because such cases do not require a conclusion that a state entity has violated the Act and such cases do not require the issuance of a National Labor Relations Board order against such an entity. See International Association of Machinists (Lufthansa German Airlines), 197 NLRB 232, enfd. 491 F.2d 367 (C.A. 9, 1974). Accordingly, I am refusing to issue complaint in this matter.

Jan 26, 1977

N. Peter Lareau, Esq.
Venable, Baetjer & Howard
1800 Mercantile Bank
& Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201

Re: Baltimore Building and Construction Trades Council, AFL-CIO, et al., and Associated Builders and Contractors, Inc., Baltimore Metropolitan Chapter

Case No. 5-CE-57

Dear Mr. Lareau:

This is in response to your letter requesting that the above-captioned case be processed expeditiously.

The case presents novel and difficult legal issues in a complex area of the law, and it is for this reason that the matter was referred to the Division of Advice. However, in view of the project and the substantial expenditures involved, that Division will reach a disposition of the case in the very near future and will telephonically communicate that disposition to the Regional Office as soon as it is reached. The Region will then promptly notify all parties.

Sincerely,

John S. Irving
General Counsel

cc: Region 5

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 701. (a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 702. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other that money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

28 U.S.C. § 1337. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

29 U.S.C. § 152. (2)(3) When used in this subchapter—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 153 (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 158. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in

the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

29 U.S.C. § 158(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 160. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

§ 8(b)(4)(i)(ii)(B) as proposed in H.R. 8400

(b) It shall be an unfair labor practice for **a labor** organization or its agents –

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease, or to agree to cease, using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease, or agree to cease, doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;

§ 8(b)(4)(A) of Labor Management Relations Act, 1947

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;